



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

VIRGINIA LAW REVIEW

Published Monthly, During the Academic Year, by University of Virginia Law Students

Subscription Price, \$3.50 per Annum - - 50c per Number

Editorial Board.

RANDOLPH C. COLEMAN, *President.*

GEORGE R. MARTIN, *Notes Editor.*

PARSONS NEWMAN, *Decisions Editor.*

FREDERICK D. G. RIBBLE, *Book Review Editor.*

THOMAS J. MICHIE, JR., *Virginia Editor.*

WILLARD R. ASHBURN, *Ass't Virginia Editor.*

ROMULUS C. SMITH, *Ass't Virginia Editor.*

BLACKSTONE D. AYRES,

WALTER J. BERGSTROM,

RICHARDSON BRONSON,

ROBERT Y. BUTTON,

BERNARD P. CHAMBERLAIN,

FRANK P. CHRISTIAN, JR.,

WILLIAM F. COX, JR.,

FRANK W. DAVIES,

F. BARTOW FITE, JR.,

THOMAS H. MIDDLETON,

PHILIP M. PAYNE,

EDMUND M. PRESTON,

THOMAS L. PRESTON,

IRVIN G. CRAIG,

MAURICE A. SILVER,

MEADE T. SPICER, JR.,

JOHN B. SPIERS,

FRANK S. TAVENNER, JR.,

ANSON W. H. TAYLOR,

JERE M. H. WILLIS,

ELLSWORTH WILTSHIRE.

RICHARD E. SHANDS, *Business Manager.*

GEORGE I. DAVISSON, *Ass't Business Mgr.*

JOHN J. MORRIS, JR., *Ass't Business Mgr.*

THE SEVERAL METHODS OF CREATING SPENDTHRIFT TRUSTS WITH A CONSIDERATION OF THE SITUATION WHERE THERE IS A VESTED RIGHT IN THE CESTUI.—From early times grantors and testators have been perplexed by the troublesome problem of how to provide for spendthrift relatives, friends, or dependents in such a way that the latter would continually receive a comfortable support without having possible access to the principal from which their income would be derived, and, further, so that the creditors resulting from the improvidence and folly of these spendthrifts could not have a prior right over them even to this income. The common law considered as inseparable and inviolable incidents to the ownership of property the right of alienation and the liability of the property for the owner's debts.¹ This concept has limited the English doctrine of spendthrift trusts and has been everywhere the thorn in the creation of these trusts. A legal life estate is subject to these legal incidents of property, even though the de-

¹ 2 THOMAS, COKE UPON LITTLETON, p. 30; 2 MIN. INST., 2nd ed., pp. 250, 251; Brandon v. Robinson, 18 Ves. 429, where in delivering the opinion of the court Lord Eldon said: "If property is given to a man for his life, the donor cannot take away the incidents to a life estate." Graves v. Dolphim, 1 Sim. 66. Rochford v. Hackman, 9 Hare 475.

wise especially stipulates otherwise.² An express trust, of course, gives the *cestui que trust* an equitable estate in the trust property and his vested interest in the income therefrom is alienable by him at will and is attachable by his creditors.³ Having noticed the problem and its main difficulties, let us see what our English forefathers of the eighteenth century did with it.

One of the earliest attempts in England to restrain the alienation of trust property occurred in the great case of *Foley v. Burnell*,⁴ where the testator devised certain heirlooms to be held in trust for the consecutive owners of a certain one of his landed estates, but the court held that an estate tail was created in his son, the present owner, which would revert through him to the grantor's heirs, thus defeating the end sought by the testator. However, a more favorable result was reached a few years later when it was held in *Dommett v. Bedford*,⁵ that an annuity by will charged upon real estate to A for life, payable to him only, and to cease immediately on alienation, ceased by the bankruptcy and bargain and sale of the estate by A. Following this were cases granting valid trusts for beneficiaries until they should become bankrupt, when their interests in the incomes would cease and determine.⁶ But, if the trust be for the support of a person and his dependents, and he become bankrupt, his assignees may not attach the income because of the dependent's interest.⁷ Where, however, the beneficiary is already a bankrupt at the time of the devise or grant, his assignees may acquire an interest in the income commensurate with his own;⁸ or, as it is ably said by the Vice-Chancellor, Sir John Leach, in *Graves v. Dolphin*:⁹ "The policy of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy."

A few of the early cases were based on the principle of reposing in the trustee a discretion of how to apply the fund for the bene-

² *Ehrisman v. Sener*, 162 Pa. St. 577, 29 Atl. 719; *Wellington v. Janvrin*, 60 N. H. 174; *McCleary v. Ellis*, 54 Iowa 311, 6 N. W. 571; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376.

³ *Scott v. Patterson*, 104 Va. 455, 51 S. E. 848; *Petty v. Sanitarium*, 110 Va. 815, 67 S. E. 355.

⁴ 1 Bro. C. C. 274.

⁵ 3 Ves. 149.

⁶ *Brandon v. Robinson*, *supra*, holding that if the limitation of the beneficiary's estate is only until he becomes bankrupt, then nothing goes to his assignees; but if for his support outright, he has an equitable and attachable interest therein, and while it is his property it must be subject to the legal incidents of property. *Younghusband v. Gisborne*, 1 Coll. C. C. 400.

⁷ *Godden v. Crowhurst*, 10 Sim. 642.

⁸ *Graves v. Dolphin*, *supra*.

⁹ *Id.* See *Younghusband v. Gisborne*, *supra*, where it is allowed as a condition precedent that the provision shall not vest until the debts are paid, and as a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to some other person. Followed by the U. S. Sup. Ct. in *Nichols v. Levy*, 5 Wall. 433.

fit of the *cestui que trust*. Where the gift is for the maintenance and support of the beneficiary only in such amounts as the trustee shall see fit to release to him, the remainder and accumulation to go to his heirs, the trust is valid and his assignees in bankruptcy have no interest in it;¹⁰ but where the trustee is compelled to apply the income, his discretion being only as to the manner of application, then the assignees have an interest in the income even by way of anticipation.¹¹

An express trust for the support of an adult, though containing provisions that the fund shall not be alienable nor assignable for the latter's debts, was held invalid even in this early period.¹²

Having seen how the English courts wrestled with the problem and their methods of coping with it, we turn now to consider briefly the subject of spendthrift trusts in general. A recent case defines a spendthrift trust as one which provides a fund for the benefit of another, and secures it against his own improvidence, placing it beyond the reach of his creditors.¹³ And where the power of involuntary alienation in favor of creditors is to be restricted, so likewise must the voluntary alienation by the beneficiary be dealt with.¹⁴

In regard to our particular question of whether or not a debtor may retain any beneficial interest in a trust fund beyond the reach of a creditor's bill, the authorities are divided between two rules, which may be called the English and the American respectively. By the English rule, as seen above, a devise to a debtor, though expressly forbidding alienation and declaring the property not subject to execution, would be invalid for those purposes because of the debtor's vested interest in the property.¹⁵ This is the doctrine and rule adhered to in several of our states, unless recently changed by statute: Alabama,¹⁶ Connecticut,¹⁷ Georgia,¹⁸ North Carolina,¹⁹ South Carolina,²⁰ Rhode Island,²¹ Wisconsin,²² and by statute Kentucky;²³ but by far the greater

¹⁰ *Twopeny v. Peyton*, 10 Sim. 487.

¹¹ *Green v. Spicer*, 1 Russ. & Myl. 395.

¹² *Younghusband v. Gisborne*, *supra*.

¹³ *Carter v. Brownell* (Conn.), 111 Atl. 182.

¹⁴ *Bridge v. Ward*, 35 Wis. 687; *Blackstone Bank v. Davis*, 21 Pick. 42, 32 Am. Dec. 241.

¹⁵ *Green v. Spicer*, *supra*; *Piercy v. Roberts*, 1 Myl. & K. 4; *Lord v. Bunn*, 2 You. & Coll. 98.

¹⁶ *Smith v. Moore*, 37 Ala. 327.

¹⁷ *Carter v. Brownell*, *supra*, superseding through the operation of a statute of 1899 the earlier and *contra* doctrine as held in *Leavitt v. Beirne*, 21 Conn. 1.

¹⁸ *Gray v. Obear*, 54 Ga. 231.

¹⁹ *Dick v. Pitchford*, 21 N. C. 480.

²⁰ *Ford v. Caldwell*, 1 Riley (S. C.) 282.

²¹ *Tillinghast v. Bradford*, 5 R. I. 205.

²² *Bridge v. Ward*, *supra*.

²³ *Marshall's Trustee v. Rash*, 87 Ky. 116, 7 S. W. 879, 12 Am. St. Rep. 467, superseding through the operation of a statute of 1888 the earlier and *contra* doctrine as held in *Pope v. Elliott*, 47 Ky. 56.

number of states follow the American rule as finally laid down in the great case of *Nichols v. Eaton*,²⁴ where, though by *dictum*, it strongly dissents from the English view that creditors may attach an equitable estate where provisions are made by the grantor that it shall not be liable for the grantee's debts. Aligned with this rule, unless recently changed by statute, are certainly the following: U. S. Circuit Courts,²⁵ District of Columbia,²⁶ Illinois,²⁷ Iowa,²⁸ Massachusetts,²⁹ Maine,³⁰ Maryland,³¹ Missouri,³² New York,³³ Pennsylvania,³⁴ Tennessee,³⁵ West Virginia,³⁶ and Vermont.³⁷ In this connection it is immaterial whether the intent to exclude creditors be expressed in terms or by implication.³⁸ And, of course, a devise of property not in trust is subject to debts though expressly providing otherwise.³⁹ Again, wherever an equitable estate is merged in a legal estate it becomes immediately, as other legal estates, alienable by the owner and liable for his debts.⁴⁰

Several methods have been worked out by the courts to create valid spendthrift trusts in favor of improvident or reckless beneficiaries. The earliest, perhaps, was the devise of an income for the benefit of a *cestui que trust* which would automatically cease and revert elsewhere on the latter's insolvency or bankruptcy,⁴¹ and in certain instances to cease and determine upon the *cestui's* attempted alienation.⁴² Whenever such trusts were by their terms expressly for and only for the maintenance of the beneficiary or for the support of him and his family or dependents, and by further stipulation not to be alienable by him nor to be applied to his debts, they were valid.⁴³ This may be considered a second method of creating valid spendthrift trusts, though it has never been extensively used due to the contrary holding on

²⁴ 91 U. S. 716.

²⁵ *Spindle v. Shreve*, 4 Fed. 136.

²⁶ *Fearson v. Dunlop*, 10 Mackey (D. C.) 236.

²⁷ *Waldo v. Cummings*, 45 Ill. 421.

²⁸ *Olsen v. Youngerman*, 136 Iowa 404, 113 N. W. 938.

²⁹ *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504.

³⁰ *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873.

³¹ *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 9 Am. St. Rep. 398.

³² *Sampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358.

³³ *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113.

³⁴ *Overman's Appeal*, 88 Pa. St. 276; *Mannerback's Estate*, 133 Pa. St. 342, 19 Atl. 552.

³⁵ *Jourolman v. Massengill*, 86 Tenn. 81, 5 S. W. 719.

³⁶ *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405.

³⁷ *Wales v. Bowdish*, 61 Vt. 23, 17 Atl. 1000.

³⁸ *Brooks v. Reynolds*, 59 Fed. 923.

³⁹ *McCleary v. Ellis*, *supra*.

⁴⁰ *Hahn v. Hutchinson*, 159 Pa. St. 138, 28 Atl. 167.

⁴¹ *Younghusband v. Gisborne*, *supra*; *Dommatt v. Bedford*, *supra*; *Nichols v. Levy*, *supra*; *Godden v. Crowhurst*, *supra*.

⁴² *Joel v. Mills*, 3 Kay & J. 458.

⁴³ *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Pope v. Elliott*, *supra*; *Leavitt v. Beirne*, *supra*.

the point in those states following the English rule. The defects of both of these methods are glaringly apparent. In the first, upon the bankruptcy of the beneficiary, neither are his creditors to benefit nor is he to enjoy any subsequent income from the trust; and the second is by the divergence of the courts too limited in application.

The more workable plan; however, and that more uniformly approved by the courts, is designed to place neither a legal nor an equitable estate in the beneficiary. This is accomplished by a deed or devise empowering the trustee to hold the property under no obligation at all to the *cestui* other than to apply to him whatever amount or portion of the income the trustee *in his uncontrolled discretion* sees fit, while the remainder and possible accumulations accrue to the trust estate. This method was aimed at by the English court,⁴⁴ and is also the doctrine of our leading Supreme Court case on the general subject,⁴⁵ and has been strongly upheld in the various state courts.⁴⁶ The opinion in *Nichols v. Eaton*, *supra*, admits that a person may in a devise restrict part of his *personalty*, as a clock or piano, from the claims of creditors of the devisee, and the latter, from the nature of the things and from the surrounding circumstances as well, are charged with notice of this restriction; then, by analogy, the case of *rents from real estate* may be so made exempt in the testator's devise, for wills are all on public record where the creditors have sufficient opportunity for examining them to be charged with notice of their provisions.⁴⁷

A person may not, on the other hand, guard against his own improvidence, to the extent of defrauding his creditors, by creating a spendthrift trust on his own behalf, or, in other words, such a trust may not proceed from the debtor.⁴⁸

It is an old maxim, as intimated above, that creditors in their suits must stand in the shoes of their debtors. It is held, wherever the English rule prevails, that whatever property rights the *cestui que trust* can demand from his trustee may be attached by his creditors, unless the *cestui's* rights are so connected and blended with those of others that the property can not be subjected without prejudice to these latter rights;⁴⁹ or, in other words, where the *cestui* has a right to expect an income from the trustee and the latter has no right to exclude it from him, then his assignees and creditors may claim from the trustee that

⁴⁴ *Twopeny v. Peyton*, *supra*.

⁴⁵ *Nichols v. Eaton*, *supra*.

⁴⁶ *Leavitt v. Beirne*, *supra*; *Hall v. Williams*, 120 Mass. 344.

⁴⁷ Upheld in *Fisher v. Taylor*, *supra*; *Vaux v. Parke*, 7 Watts & S. (Pa.) 19; *Thackara v. Mintzer*, 100 Pa. St. 151.

⁴⁸ *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135, 23 Am. St. Rep. 215; *Petty v. Sanitarium*, *supra*; *Bank v. Windram*, 133 Mass. 175.

⁴⁹ *Nickell v. Handly*, 10 Gratt. (Va.) 336.

amount which the debtor would otherwise have had the right to demand and expect from him.⁵⁰

For the Virginia law on this subject see VIRGINIA SECTION, p. 236.

B. P. C.

IS SECTION 50(K) OF THE PRESENT BANKRUPTCY ACT DIRECTORY OR MANDATORY?—The present Bankruptcy Act of 1898, as amended, requires of a trustee in bankruptcy no more definite qualification than that he be competent, and that he reside or have an office in the judicial district within which he is appointed.¹ He must be competent; and if, in the opinion of the creditors and in that of the court, as shown by its approval of the creditors' choice, he measures up to their standard of competency, and at the same time has an office or is a resident in that district, he satisfies the statute. Being thus qualified, the statute² further requires that he enter into bond, approved by the court, "before entering upon the performance of * * * official duties, and within ten days after * * * appointment, or within such further time, not exceeding five days, as the court may permit, * * *."

Thus the failure to qualify further before entering upon the performance of the trustee's duties results in a vacancy in his office. To quote the statute verbatim:³

"If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office."

This section gives rise to the question whether a failure on the part of the trustee in bankruptcy to enter into bond vacates the office, *ipso facto*, or whether such failure to comply with the statute and a continuance in office creates a *de facto* trustee; in other words—whether the section is directory or mandatory. It is stated by Remington⁴ that failure thus to qualify is a fatal defect in the trustee's title to office, rendering the office vacant *ipso facto*. But Remington cites no authority, and gives neither reason nor principle upon which he bases this bare assertion. If this failure does in fact operate *ipso facto* to vacate the office, and is mandatory, a *de facto* trustee cannot possibly be created, for the office becomes vacant *ab origine*; no officer exists, not even under a colorable title.

In a recent case, however, *Sharfsin v. United States*, 46 Am.

⁵⁰ *Rippon v. Norton*, 2 Beav. 63; *Page v. Way*, 3 Beav. 20; *Wallace v. Anderson*, 16 Beav. 533; *Kearsley v. Woodcock*, 3 Hare 185; *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 7 VA. LAW REG. 785, and note; *Carter v. Brownell*, *supra*.

¹ Bankr. Act, § 45.

² Bankr. Act, § 50 (b).

³ Bankr. Act, § 50 (k).

⁴ 1 REMINGTON, BANKRUPTCY, § 877.